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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 652

GRACE CORSO,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association, as Executor of the Estate of Walter P. Story, also known as W. P. Story, and also known as Walter Perry Story, Deceased,

Appellee.

Appeal From the District Court of Appeal, Second Appellate District, State of California

STATEMENT OF JURISDICTION.

GRACE CORSO,
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Los Angeles 46, California,
Appellant pro se.

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Appellee.

Appeal From the District Court of Appeal, Second Appellate District, State of California

STATEMENT OF JURISDICTION.

Statement as to Jurisdiction.

Appellant, Grace Corso, submits herewith her statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the District Court of Appeal, Second Appellate District, State of California, Second Civil No. 23677.

The Opinion Below.

The opinion of the District Court of Appeal, Second Appellate District, State of California, is reported in 171 A. C. A. 883 (not yet in permanent State reports), and in 342 P. 2d 56. A copy of this opinion is attached hereto as Appendix A.

Jurisdiction.

This is an appeal from judgment of the District Court of Appeal, Second Appellate District, State of California, affirming a judgment of the Superior Court of the State of California, in and for the County of Los Angeles.

The decision of the District Court of Appeal, Second Appellate District, State of California, was filed on July 9, 1959. Appellant filed a petition for hearing in the Supreme Court of California, within the time allowed by law. Hearing was denied by the Supreme Court of the State of California, on August 31, 1959. Notice of Appeal to this Court was filed on Monday, November 30, 1959, with the Clerk of the District Court of Appeal, Second Appellate District, State of California. On authority of *Union National Bank of Wichita, Kansas v. Lamb*, 337 U. S. 38, 69 S. Ct. 911, 93 L. Ed. 1190, when the ninetieth day falls on Sunday, an appeal taken on the following day is timely.

The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. A., section 1257(2). Appellant challenges the constitutionality of California Code of Civil Procedure, Section 1880(3), as applied in this specific case, which prohibited the appellant from testifying in her own behalf. A statute may be invalid as applied to one state of facts and yet valid as applied to another. See, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289, 42 S. Ct. 106, 108. The text of the code section or statute involved, reads, as follows:

"The following persons cannot be witnesses:

* * * * * * * *

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or

proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

Appellant was prejudiced by the application of this code section to this case, and judgment was rendered against her. Appellant contends that thereby she was deprived of her property without due process of law, and also denied equal protection of her property rights, all in contravention of and repugnance to the Fourteenth Amendment of the United States Constitution. The decision of the District Court of Appeal, Second Appellate District, State of California, was in favor of the validity of this code section, California Code of Civil Procedure, Section 1880(3), as applied in this case. This decision was approved, including application of this statute or code section to this case, by the Supreme Court of California, when it refused to order a hearing of this case. The appellant has exhausted her remedy in the State of California, and the highest court of the state has ruled in favor of the validity of this statute or code section, as applied in this case.

In the trial court, appellant pointed out and argued the constitutional ground here urged, and also in the District Court of Appeal, Second Appellate District, State of California, and the decision of that court held against the appellant. See, Appendix A, pages 17 and 18 This Court will accept the recognition by the state court that the federal questions were properly raised in that court.

Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U. S. 182, 185, 65 S. Ct. 624, 627, 89 L. Ed. 857.

Cases believed to sustain the jurisdiction of this Court on appeal are:

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451;

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 52 S. Ct. 103;

Hawkins v. Bleakly, 243 U. S. 210, 37 S. Ct. 255;

Western & A. R. R. v. Henderson, 279 U. S. 639, 49 S. Ct. 445;

Manley v. State of Georgia, 279 U. S. 1, 49 S. Ct. 215;

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724;

Interstate Commerce Comm. v. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185; and

Colgate v. Harvey, 296 U. S. 404, 56 S. Ct. 252.

Questions Presented.

1. Whether or not California Code of Civil Procedure, Section 1880(3), which prohibits plaintiff from testifying against decedent's estates, is in violation of the Due Process Clause of the Fourteenth Amendment, of the United States Constitution, as applied in this case, where plaintiff is the only witness to the act of negligence of decedent's agent, other than decedent's agent, such negligence causing severe injury and damage to plaintiff and appellant, when decedent operated a large business, as an individual through agents, and at no time had any contact or personal transaction with plaintiff, and plaintiff is thereby prohibited from testifying concerning decedent's agent's negligence whereby plaintiff was injured, although decedent's agent was alive and testifying against plaintiff.

2. Whether or not, said California Code section, likewise, violates the Equal Protection Clause of the said Fourteenth Amendment of the United States Constitution.

Statement.

The statement of facts set forth in the District Court of Appeal opinion, Appendix A, is substantially correct, and there does not appear to be any dispute over the facts by the parties to this action. The questions presented are wholly concerned with the application of California Code of Civil Procedure, Section 1880(3), as interpreted by the said District Court of Appeal, Second Appellate District, State of California.

Appellant was plaintiff in a personal injury action in the trial court, the Superior Court of the State of California, in and for the County of Los Angeles. Appellant alleged in her complaint, (First Amendment of First Supplemental Complaint for Personal Injuries) Paragraph VII, thereof, to the effect that on January 27, 1955, she sustained injuries of substantial proportions to her left leg in slipping and falling on water laying on the marble floor, outside of the women's toilet of the Walter P. Story Building, located at 610 South Broadway, Los Angeles, California. That this injury was sustained as the result of the negligence of defendant Walter P. Story, the owner of the building, and his employees and agents.

Walter P. Story owned this building in his individual name. It was a large office building in the business district of Los Angeles. Appellant was an employee of a tenant of the building. She went to the women's toilet, maintained for the use of the tenants, their employees and

guests. The toilet was maintained by the building, and directly serviced by one, Mary Gonzales, a matron and employee of the owner, Walter P. Story. The appellant's office and the toilet in question was on the eighth floor of the building. The injury also occurred on this floor.

The matron, Gonzales, on the day in question, started at the eleventh floor to clean the toilets and worked down, until she came to the eighth floor women's toilet. She found a bowl that had run over in the toilet. She went to get the equipment necessary to correct the situation. On her return she encountered appellant Corso coming down the hall, and opened the door for appellant. Appellant went in, and after about five minutes, left by the same door she came in. By this time, the matron had practically cleaned up the toilet floor, but was still working around the overflowed bowl.

When appellant left the toilet, she slipped and fell on the marble floor, in the outside hallway, just outside the toilet door, sustaining severe and permanent injuries.

On March 7, 1956, the attorneys for Walter P. Story, the defendant, took the appellant's deposition for purposes of discovery, as an adverse witness under Code of Civil Procedure, section 2055. This deposition covered employment of appellant, the nature of her work, her going to the toilet on January 27, 1955, her leaving the toilet, her fall, and return to her office. After the fall, appellant was stunned and not able to make an inspection of the floor where she fell, to ascertain what caused her fall. However, after appellant had recovered her composure, about 45 minutes later, she went down the hall to where she fell. She inspected the spot where she fell. She was not asked about her inspection, or what she saw, by Walter P. Story's attorneys at the deposition, nor did she volunteer this information. This was not in her deposition.

Before the case came to trial, the defendant Walter P. Story died, on June 18, 1957. Prior to trial, appellant suggested to the court the fact of the death of the defendant Story, the court ordered the substitution of defendant, and appellant filed the amended supplemental complaint upon which the case went to trial, against the Security-First National Bank of Los Angeles, as executor of the estate of Walter P. Story.

Appellant's first witness at the trial was the matron, Mary Gonzales. She was questioned under the said Code of Civil Procedure, section 2055, and then fully interrogated on all facts pertinent to the case by the attorneys for the defendant Bank, executor of the Estate of Story. Among other things, the matron Gonzales, testified [Rep. Tr. p. 13, lines 1-8]:

"Q. Did you know Mr. Story? A. Yes, sir.

Q. Did he ever give you any direct instructions himself? A. No.

Q. Was he present on this occasion on January 27, 1955, as far as you know? A. No."

The matron further testified that she reported the incident later to Mr. Philip, her supervisor.

The appellant as plaintiff took the witness stand to give her full testimony of what happened to her leg, how she fell, and the condition of the floor in front of the women's toilet on the eighth floor of the Walter P. Story Building. The attorneys for the Bank, as executor of the Estate of Story, objected to any testimony by plaintiff and appellant on the ground that Code of Civil Procedure, section 1880(3), prohibited any testimony on the part of plaintiff, on a claim or demand, against the estate of a decedent.

Long discussion ensued in chambers and argument was made as to the admissibility of appellant's testimony, set forth in the Reporter's Transcript, page 27, to page 49. At that time appellant argued, among other things that to prohibit appellant from testifying was prejudicial to her cause, and also "violates the doctrine of fairness to both sides in this case", [Rep. Tr. p. 29, line 14, to p. 30 line 3; p. 32, lines 12-13]. The court ruled that appellant could not testify to any matter or fact with regard to the case which occurred prior to the death of decedent Story. The court did permit the deposition of appellant to be read into evidence. She testified as to her later physical condition after June 18, 1957. The only persons present at the injury or afterward, who could testify, were appellant and the matron Gonzales. This was according to the testimony of witness Gonzales. Also, the deposition of appellant, Corso, as reported in Rep. Tr. p. 72, lines 16-20, confirmed that:

> "Q. Did you see anyone else from the time that you fell until you went back in your office? A. No.
>
> Q. —other than the matron? A. I did not see anyone."

This was a jury trial, and the jury returned a verdict for defendant, 9-3. [Rep. Tr. pp. 170-172].

The Appeal in the State Courts.

Appellant appealed the judgment of the trial court entered upon the jury verdict in favor of the defendant to the District Court of Appeal, Second Appellate District, State of California.

In the lengthy opinion, set forth in Appendix A, the court affirmed the trial court judgment for defendant. The District Court of Appeal opinion held that Code

of Civil Procedure, section 1880(3), applied in this case to appellant, and that she could not testify, that it was proper for the trial court to permit appellant to testify by her deposition taken by defendant for defendant's purposes, that assuming it was error to prohibit appellant from testifying in person it was ruled to be substantial and prejudicial to appellant's case, and, lastly, that Code of Civil Procedure section 1880(3), did not offend the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, or the Constitution of the State of California.

Appellant then petitioned the California Supreme Court for a hearing, arguing the same points and pointing out the errors of the District Court of Appeal decision. Hearing was denied on August 31, 1959. This appeal was taken on November 30, 1959.

The Federal Questions Are Substantial.

1. **Appellant Was Deprived of Her Property Without Due Process of Law in Violation of the Fourteenth Amendment of the United States Constitution, When She Was Prohibited From Putting on Her Case While Defendant Was Permitted to Put on Its Full Case Whether Decedent Story Was Dead or Alive.**

The federal questions were raised in the trial court and on appeal, and ruled on by the District Court of Appeal. See, Appendix A, pp. 17-18. This Court accepts the recognition by the state court that the federal questions were properly raised in that court. *Charleston Federal Savings & Loan Ass'n. v. Alderson*, 324 U. S. 182, 185, 65 S. Ct. 624, 89 L. Ed. 857. The determinations by the District Court of Appeal and approval by the highest court of California, have become final, and exhausted the appellant's remedy. The construction of Code

of Civil Procedure section 1880(3), by the District Court of Appeal, approved by the Supreme Court of California, is binding on this Court. *United States v. Burnison*, 339 U. S. 87, 70 S. Ct. 503. The District Court of Appeal held (Appendix A, pp. 16-17), as follows:

> "We have herein set forth in some detail the contents of appellant's deposition, and from a reading thereof, we are satisfied that had the court erred in applying the restrictions of Code of Civil Procedure, section 1880, subdivision 3, to appellant's testimony it could not reasonably be urged that the judgment should be affirmed because no prejudice ensued to appellant from such ruling."

Thus, determination of the federal questions raised here is essential to the decision of this case.

All of the States of the Union, except Louisiana, have a so-called "Dead Man's Statute", as Code of Civil Procedure, section 1880(3), is the statute for California. The provisions of these are as varied as the states themselves.

That code section, as set forth in *Stuart v. Lord*, 138 Cal. 672, 676, 677, 72 Cal. 142, has as an object and purpose, "to put them (the parties) on an equal footing in respect to such evidence". This is the final expression by the California Supreme Court on this code section, made in 1903. That is the case that caused the District Court of Appeal to affirm the trial court in this case and deny appellant's right to testify, and the California Supreme Court to deny a hearing. This case also held: "there is nothing in the statute to indicate that its effect was intended to be limited to things which occurred in the presence of the deceased." Thus, the code section is sweeping and complete and applies to all plaintiffs and all evidence, whatever the subject matter or concerning what person or persons.

The appellant is left completely without a remedy for her severe injury and damage sustained because of this carelessness and breach of duty to plaintiff's physical well-being, unless this statute as applied to this statement of facts in this case is unconstitutional as being repugnant to the Fourteenth Amendment of the United States Constitution, both Due Process Clause and Equal Protection Clause. Consequently, decedent's property in his probate estate is held intact and not accountable for the breach of legal duty toward appellant's physical well-being and integrity.

Appellant was denied a fair trial by this denial of the right to testify, and also this code section is in essence and effect a conclusive and irrebuttable presumption that the appellant would testify falsely, if she testified. It is further a conclusive and irrebuttable presumption that decedent's employees were scrupulously careful and without any trace of negligence in operating decedent's property. Likewise, that as a matter of law decedent would have testified truthfully of what happened if he had been alive to testify although he was not present and had no knowledge of what happened, save by hearsay reports to him.

This Court has said in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 50 S. Ct. 451:

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Further, in *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 52 S. Ct. 103, this Court said:

> "The state, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be prima facie evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed, The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense."

Also, in *Hawkins v. Bleakly*, 243 U. S. 210, 37 S. Ct. 255, this Court, said:

> "The establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself, and not conclusive of the rights of the party, does not constitute a denial of due process of law."

In addition, the Court in *Western & A. R. R. v. Henderson*, 279 U. S. 639, 49 S. Ct. 445, said:

> "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates

> the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property."

See, also *Manley v. State of Georgia*, 279 U. S. 1, 49 S. Ct. 215.

In this case, the decedent Story was the owner of a large twelve story office building in the business district of Los Angeles. He had a manager who ran the building. His name was Mullin. Then decedent Story had a supervisor of the help, Mr. Philip. Under him were employees such as the matron Gonzales. The appellant was, at no time, offering or intending to testify against decedent Story personally. The subject matter of the testimony was water on the marble floor in the hallway. That was not an inherent defect in the building that decedent Story was personally negligent in not repairing. Appellant was concerned with water either tracked out or put there by third persons unknown. The negligence is the way the matron Gonzales handled the question of water and the overflow of the bowl, not anything decedent Story did or did not do himself. Mr. Story was not present at the time, but if he was he would only have been like any other witness. He would not be testifying about what he did or did not do, but what matron Gonzales did or did not do. The only thing that brings decedent Story into the case is the common law fiction of *respondeat superior*, on the basis of public policy, and the theory that the principal is liable for the negligence of his agent, because the principal was in legal contemplation negligent in hiring a negligent agent. So, actually the action is between appellant and matron Gonzales, who was present and testified. Matron Gonzales could have been sued, but probably is financially

irresponsible, so the principal, Story, is sued as a matter of law. Appellant was deprived of the right to testify against the matron Gonzales, as she did not need to testify against decedent Story. The fact of agency was admitted by the Bank as executor of the Estate of Story, and also the appellant's rights in the building.

This Court has set forth the general principal which requires a fair hearing, which is one of "the rudiments of fair play", which is assured to every litigant by the Fourteenth Amendment, as a minimal requirement (*Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 57 S. Ct. 724). That principle applies in any kind of hearing or trial, not only rate cases for public utilities companies. Also, this Court says, in *Interstate Commerce Comm. v. Louisville & N. R. Co.*, 227 U. S. 88, 33 S Ct. 185, as follows:

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

The District Court of Appeal relies on *Flemming v. Superior Court*, 196 Cal. 344, 238 Pac. 88, to justify this type of legislation. That case, among other things, says:

> "In considering such a question (unconstitutionality of a statute), the courts will inquire whether there is any rational theory upon which the action of the legislature in passing a law can be sustained."

The District Court of Appeal in citing *Flemming v. Superior Court, supra*, points out restrictive legislation concerning testimony in the cases of attorney-client, phy-

sician-patient, confessor-confessant, etc., relations. They do have a sound public policy behind them, so that the client's interest can be fully protected, or the patient's, etc., without having his private affairs revealed to the public. The next time he won't reveal everything, and then the confidential relation is lost.

In this case, there is no such public policy. The case of *Stuart v. Lord*, 196 Cal. 344, 238 Pac. 88, in 1903, said that the purpose of the statute or code section, was to put "the parties on an equal footing." That is sheer nonsense. Even in the case of a personal transaction between two parties, on the death of one of them, the other is deprived of his right to testify, and in most cases of his lawsuit and property rights. In personal injury actions, it involves human rights, as the decedent has property or he would not have a probate estate, and the injured person in most cases is the person least able to bear the loss of injury with the huge medical bills, loss of earnings, and vocation, as well as the pain and suffering. What has the decedent or decedent's estate lost? Nothing; it is kept intact, although he was probably in breach of legal duties to the injured person. It is not putting each party on an equal footing at all. It is the philosophy that the decedent's property must be saved at all costs and the injury is unimportant. They shouldn't have gotten hurt anyway.

In this case, as the statute or code section applies to this case, the reason is still more compelling for saying that the purpose is not to put the parties on an equal footing. Appellant was never on an equal footing with decedent prior to his death, and after her incapacitating injury was still less on an equal footing, and decedent's death should have no effect on appellant's case: the charge of this action was not against him in anyway, only by law because he was the principal.

Thus, appellant is legally established as a liar, she has lost her law suit because she could not testify, and in addition has sustained a tremendous financial loss, while the decedent's estate is in the same position it was in or would have been in before appellant was injured, even with negligent employees.

No public policy for such, no rational basis for such, and no justification for such, is apparent. Thus, appellant has been deprived of a fair trial in contravention of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. Appellant Was Deprived of Equal Protection of Her Property Rights With Defendant, and With Other Plaintiffs, in Violation of the Fourteenth Amendment of the United States Constitution.

The same facts and argument are pertinent, and overlap to a great extent, in the claim that appellant was denied Equal Protection of the law in violation of the same Fourteenth Amendment of the United States Constitution. The appellant has been put into a different classification than other plaintiffs in any ordinary case, and most of all, into a different classification than the defendant in this case, and the decedent and his property. There must be a reasonable purpose, not arbitrary, to justify that. It must rest on some ground of difference having a fair and substantial relation to the object of the legislation. (*Colgate v. Harvey*, 296 U. S. 404, 56 S. Ct. 252.)

This is no easier to find than the reason to obviate a violation of the Due Process Clause. There is none, other than the desire to protect the decedent's property at all costs, and destroy the rights of innocent victims of negligence. It is so harsh as to be beyond the pale of reason.

Because there might be some unscrupulous persons who would make false claims against decedent's estates, the law denies the rights of the honest victims, to save the decedent's property. The law ought to be able to find truth without forbiding people from testifying. England and Louisiana survive without a Dead Man's Statute.

In the instant case, all the more. It is the most extreme situation that can occur under these statutes. The decedent is given an unconscionable immunity, and appellant unfairly dealt with by a ruinous blow to her personal rights.

Conclusion.

Appellant respectfully suggests that this appeal brings before this Court federal questions under the Constitution that are far-reaching and important, both in terms of legal principles and of practical impact upon the right to maintain an action for damages for personal injuries, and the right to testify therein; and that enough has been said to demonstrate that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

GRACE CORSO,

Appellant pro se.

APPENDIX "A".

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Grace Corso, Plaintiff and Appellant, vs. Security-First National Bank of Los Angeles, a National Banking Association, as Executor of the Estate of Walter P. Story, also known as W. P. Story, and also known as Walter Perry Story, Deceased, Defendant and Respondent. Civil No. 23677.

Filed July 9, 1959. J. E. Brown, Clerk.

Appeal from a judgment of the Superior Court of Los Angeles County, William E. Fox, Judge.

For Appellant: Robert B. Heggen.

For Respondent: Moss, Lyon & Dunn; by Sidney A. Moss and Henry F. Walker.

This is an action for personal injuries, allegedly caused by the negligence of decedent and his employees. The cause was tried before a jury which returned a verdict in favor of defendant executor. Plaintiff's motion for a new trial was denied. From the adverse judgment entered upon the verdict, plaintiff prosecutes this appeal. Subsequent to the commencement of this action on November 17, 1955, and on June 18, 1957, the original defendant, Walter P. Story died, and included in his estate was a large office building in downtown Los Angeles, within which the alleged injuries sustained by plaintiff were incurred. Defendant bank was appointed executor of the estate of Mr. Story, and by subsequent order of the court below, was substituted as defendant for Walter P. Story. Plaintiff filed her verified creditor's claim with defendant bank, as said executor.

Plaintiff's "First Amendment of First Supplemental Complaint for Personal Injuries" (plaintiff's only pleading appearing in the record on appeal) reveals that for her cause of action plaintiff alleged that at all times here pertinent, the decedent, Walter P. Story prior to his death was the owner and operator of that certain building bearing his name, and located at 610 South Broadway, in the city of Los Angeles. That plaintiff, a licensed practitioner of physical therapy, was employed for herself and also as an independent contractor, by Dr. Fred J. Petrene, and that as an associate of the latter, plaintiff was a tenant in said building, occupying Room 809, on the eighth floor thereof. That on said eighth floor, the decedent provided washroom facilities for the tenants and their guests. That about 12:30 p.m. on January 27, 1955, plaintiff had occasion to enter the women's washroom. That in leaving said washroom, plaintiff walked therefrom, "in a reasonably careful and circumspect manner, and in the said hallway outside the door to the said women's washroom, the plaintiff slipped on water laying on the marble floor in the said hallway outside the said women's washroom, and fell to the said marble floor of the said hallway with great force and violence." That as a result thereof, plaintiff suffered very serious and permanent injuries.

It was further alleged that plaintiff's injuries were the direct result of the "carelessness and negligence of Walter P. Story, deceased and his servants and employees, ... in that water was allowed to be and remain on the said marble floor upon which tenants and tenants' clients, associates, guests, and other persons having business therein, might walk and slip, causing great and extensive injury to themselves and their person;".

The trial of this action commenced June 24, 1958. As her first witness, plaintiff called Mary Gonzales, under Section 2055 of the Code of Civil Procedure. This witness was a matron and janitress employed at the Story Building, and among her duties were included the cleaning of the men's and women's restrooms. She testified that on the day of the alleged accident she was using a pump on a stopped toilet bowl in the women's restroom on the eighth floor. The witness recalled seeing plaintiff on that occasion. That when she saw plaintiff opening the door of the restroom slowly and looking in, the witness told plaintiff not come in but the latter "walked in pretty fast right to the next (toilet) stall." Water had overflowed "right around the bowl" where the witness was working, "but there was no water no other place but right there." The water in the stall where the witness was working extended about two inches around the base of the bowl. Mrs. Gonzales further testified that after plaintiff entered the restroom she remained in the second stall about two minutes, during which time the witness continued working as aforesaid in the first stall. As to the conduct of plaintiff after she emerged from the second stall, Mrs. Gonzales testified:

"Q. Pardon me. What did she do after she left the second stall?

"A. She ran outside, out of the stall and stood by the basin and lifted her leg up and over her knee she rolled her stocking down and she said she got scratched and she pulled it up again in a hurry and walked out in a very—in a hurry, too.

"Q. Did you see her knee?

"A. No, I didn't.

"Q. Did you see her as she walked out?

"A. I did. I seen her walk out in a hurry. She got hurt in there. She fell and slipped.

" (The reporter read the answer.)

"The Witness: That is what she said, she slipped and fell.

"Q. Did you hear a noise, thud or any noise as though someone had fallen?

"A. No. I could have seen her right from the other stall if she had fell."

When plaintiff was called as a witness in her own behalf she testified as to her occupancy of Room 809 of the Story Building, the nature and methods of her work as a physical therapist, and the location of the ladies restroom on the eighth floor. Then the following ensued:

"Q. (By Mr. Heggen, attorney for plaintiff): Now, on January 27, 1955 did you have an occasion to leave Room 809 and go to the ladies toilet?

"Mr. Moss (attorney for defendant): Now, if your Honor please, I shall object to any testimony as to matters or facts occurring before the death of the late Walter P. Story, the original defendant in this action upon the grounds that this plaintiff is not competent to testify to any such matter or fact by reason of Section 1880, subdivision 3 of the Code of Civil Procedure . . ."

"The Court: I will sustain the objection."

After some discussion in chambers outside the presence of the jury, concerning the foregoing ruling and the refusal of the trial judge to reverse it, plaintiff's counsel offered in evidence the deposition of plaintiff taken on March 7, 1956 with the request that he be permitted

to read the same to the jury, to which defendant interposed an objection upon the grounds ". . . first, that the testimony of the plaintiff herself has been held to be barred by Section 1880, subdivision 3 of the Code of Civil Procedure, and if the testimony of the witness herself is not admissible then certainly a deposition of this same witness would not be admissible, and that, furthermore, I submit that it, too, is barred by Section 1880, subdivision 3 of the Code of Civil Procedure. . . ." The objection was overruled and plaintiff's deposition was read to the jury. Plaintiff then resumed the witness stand and testified, over defendant's objection, to matters and facts occurring subsequent to the death of Mr. Story, concerning the nature of her injuries.

Plaintiff also produced Ann O'Brien who testified concerning her observations as to plaintiff's condition after the latter returned to the office. This witness was also a physical therapist and worked in the same office as did plaintiff. She testified she was in the office when plaintiff returned from the restroom on the day here in question. That plaintiff was limping and "Her ankle looked like it was red, looked like there might be blood under the surface of the skin, like a broken vein. It was a bruise, red and her knee, on the side of her knee as I looked at it was red and she had a bump on the side of her head by the temple." That plaintiff ". . . was sitting down holding her head. That is how I first noticed there was a lump on the head. Then I observed the rest of her ankle and her knee where she had fallen on the left side and she looked like she was in a daze, like she had been hurt." That plaintiff was in a dazed condition, and appeared to be in pain. The witness further testified that about 45 minutes after plaintiff's return to the office from the restroom, the witness went down the

hall to obtain a drink of water; that in so doing she passed by the ladies' restroom, and, "I noticed marks like there had been water and someone—the way I explain it, it was like mud, dried or—or like water, foot steps, several of them and then a streak like a skid." . . . Well, to explain it, it was just like if you walked on some water and then stepped onto something and then made marks. That is the best way I could describe it because I didn't—Then there was skid marks. It could have been several foot prints. It might have been. It was blotchy like you could see—I noticed— . . . They were all together like in this area." That there was a "damp" spot on plaintiff's uniform; that plaintiff was wearing a "nurse's shoe" with a rubber sole. On cross-examination the witness was asked, "My question is, did you see anything wet on the floor when you went out there 45 minutes later?" to which she replied, "Well, I couldn't say one way or another."

We have set out in some detail the testimony of the last witness because plaintiff's counsel urges that she "was confused and vague in her testimony . . . . was not sure whether she saw water in the hall or not, and exactly where," all of which added to the prejudice sustained by plaintiff when she was denied the right to testify as to the conditions prevailing in the restroom and on the hallway floor when plaintiff allegedly slipped and fell.

Because of the importance it will assume in the consideration of the legal problems presented on this appeal, we deem it advisable to briefly summarize plaintiff's deposition which was received in evidence and read to the jury. Plaintiff testified therein that on January 27, 1955, about 11:30 or 12:00 o'clock, she went to the women's

restroom. She had used the restroom on previous days but this was the first time on this date. The hallway floors were marble. In approaching the restroom, she did not look down and did not notice any water or foreign substance on the floor. In entering the restroom itself, she first felt water when first she stepped her foot in. She did not lose her balance. She went on in and used the facilities. The matron came in; in fact she was standing at the doorway with mop in hand and she opened the door for plaintiff. Both of them walked right into the water. There was water on the restroom floor, mostly in front and in the first booth. It was clear water. Plaintiff went into the second stall. She was inside the restroom door when she first noticed water. As she left, she went to the door to the hall, opened it, and next found herself sailing through the air and down on the floor. When she was leaving the matron was in the first stall with the stall door open. The hall door was closed. It opened to the inside. She had put her first foot down on the outside of the door when she fell. The inside was damp from being mopped but it was not flooded. Her first step outside on the marble was when she fell. She does not recall again seeing water on outside as she started out. It was on her first step that she fell. She did not remember looking at the floor outside. She remembers that she did not look at the floor outside the restroom as she walked out. As she went out the door, she was not looking at anything—just to open the door and walk back to the office. She remembers skidding and that she lit on her left side. Her uniform was wet on the left side. She did not notice any water around her as she lay on the floor. She got up and went back into the restroom to tell the matron that she had fallen. She did not know whether the matron heard her or not

as the matron made no reply. Plaintiff went back to her office. She saw no one until she went back into her office. After plaintiff got up, she did not observe the condition of the floor nor did she on her way back to her office. She was stunned but had no difficulty as far as the condition of the floor was concerned in walking over the floor outside the restroom this time. She told the manager of the building about it the next day. (Plaintiff then deposed about her injuries.) As she went into the restroom, she first noticed any water when she was standing in it with both feet. There was nothing on the outside that she could notice because the matron was standing there with the mop and she opened the door and plaintiff followed her in. Plaintiff went inside the door and there first noticed the water.

"Q. You did not at any time see any water outside the door, as far as you remember?

"A. As far as I remember, I didn't see because I didn't look down.

"Q. But you don't remember standing in any water outside the door, either?

"A. No, I don't."

She was inside the door when she first noticed she was standing in water. She did not look back around to the outside then. When she came out of the stall, she noticed the matron had mopped between the first stall and the door to the hall but the area was still damp. There was quite a bit of water toward the wall of the first booth. Plaintiff did not go in that area; only through or in the area that was still quite damp. Then she went out the restroom door, and on her first step felt herself flying through the air. She did not at any time see any water or other foreign substance in the area

where her body landed or where her foot was or where her foot was when it went out from under her. Her uniform was damp but not dripping—not enough water to wring out. She did not change her uniform that day when she went back to the office but kept on the same uniform (except during the period she received some ultrasonic treatment) to finish the day.

"Q. . . . (A)s I understand it, you did not at any time see any water outside the restroom door as such?

"A. I didn't look down. That's right.

"Q. You did not see any or notice any, or notice you were standing in any water?

"A. That's right."

As her first ground for reversal of the judgment appellant earnestly urges that the trial court erred in denying her the right to testify as to how the injury occurred for the reasons set forth in Subdivision 3 of Section 1880 of the Code of Civil Procedure, which denies a party the right to testify upon a claim or demand against the estate of a deceased person, "as to any matter of fact occurring before the death of such deceased person." Appellant urges that the cases which construe this code section concern situations in which both the plaintiff and the decedent took an active personal part in the transaction involved, be it a contract or a tort. That the obvious object of the statute is to "prevent the plaintiff from having an unfair advantage against a dead man's estate."

Appellant further argues that the instant action does not parallel any case that can be found in that herein the deceased defendant Story knew nothing of the facts of this case except what was reported to him, and therefore, there is no testimony that could have been given

by decedent Story were he living, that could have refuted that which would be given by appellant as to the immediate circumstances surrounding the happenings which occasioned appellant's alleged injuries.

In the recent case of Trabin v. Title Ins. & Trust Co., 52 A. C. 161, 164, our Supreme Court thus epitomizes the historical background surrounding the statute here in question:

"At early common law witnesses having a direct pecuniary or proprietary interest in the outcome of a case were disqualified on the theory that permitting them to testify would often lead to perjury which would go undetected and that more injustice would result from receiving their testimony than from excluding it. In the nineteenth century this general disqualification was recognized to be unsound and was abolished by legislative reform. However, in this country, unlike England, an exception was made, and the common law rule was to varying extents kept in force with respect to cases involving the estates of deceased persons by statutes like subdivision 3 of section 1880. The exception was apparently based on the view that, because the lips of a decedent were sealed, there was too great a danger that interested survivors would take advantage of his estate. (For historical discussion see 2 Wigmore on Evidence (3d ed. 1940), pp. 674, 695-701; Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U. C. L. A. L. Rev. 175.) Writers in the field of evidence have vigorously attacked such legislation, reasoning in substance that it represents an anomalous retention of a discredited common law doctrine and is productive of injustice at least as great as, and more concrete than, the evil sought to be pre-

vented. (See 2 Wigmore on Evidence (3d ed. 1940): pp. 695-701; McCormick on Evidence, pp. 142-144; Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U. C. L. A. L. Rev. 175, 206 *et seq.*; Hale, The California 'Dead Man's Statute,' 9 So. Cal. L. Rev. 35, 43 *et seq.*)"

The court then goes on to say: "This court has been reluctant to extend the effect of subdivision 3 of section 1880 beyond what is compelled by its language and in many cases has narrowly construed the statute against the disqualification of a witness and in favor of the admissibility of evidence. (Citing cases.)"

The question then arises whether a witness in the position of appellant, is disqualified as a witness, upon any sound basis when subdivision 3 of section 1880, Code of Civil Procedure, is considered in the light of its background and purpose.

As stated in Moul v. McVey, 49 Cal. App. 2d 101, 105: "The object of the statute is to so balance rights as between the survivor and the deceased that no advantage may be taken of a deceased person because of the fact that his lips are sealed by death; and that the personal representative may not take advantage of the survivor."

Appellant relies upon the case of Sweet v. Markwart, 158 Cal. App. 2d 700, which was an action wherein decedent died after the commencement thereof, but prior to trial. Pending suit and prior to his death, decedent's deposition had been taken. After death of defendant, an executor of his estate was appointed. The holding was that the decedent's deposition could be used by plaintiff

against the estate. It was further held that, as to matters which decedent had made denial in his deposition, *i.e.*, concerning which he had testified, the plaintiff would be competent to testify. In the case just cited, the court, at page 711, quoting from Coble v. McClintock, 10 Ind. App. 562 (38 N. E. 74), stated, "'We think, when it is made to appear that the decedent has testified in a manner known to the law, and that his testimony is available to his estate, the reason for closing the mouth of the living party has ceased to exist, and when the reason ceased the rule should cease also.' (See also annotation, 158 A. L. R. 306.) Under such circumstances there is no advantage to the adverse party by permitting him to testify against the estate as to matters denied by the decedent because the denial of the decedent is available to the estate." Appellant also cites the case of Moul v. McVey, *supra*, p. 106, holding that when the deposition of the survivor is *taken by the executor or administrator*, whether it is read in evidence upon the trial or not, opens the door for the survivor to testify. In the instant case appellant's deposition was not taken by the executor, but during the lifetime of decedent Story. Also cited is McKee v. Lynch, 40 Cal. App. 2d 216, 227, relied upon by the trial court in admitting into evidence appellant's deposition.

Based upon the foregoing cases, appellant urges that they emphasize the provisions of Civil Code, Section 3510, "When the reason of a rule ceases, so would the rule itself."

Appellant correctly states that there is in the record the following testimony of Mary Gonzales, the matron and janitress at the Story Building:

"Q. Did you know Mr. Story?

"A. Yes, sir.

"Q. Did he ever give you any direct instructions himself?

"A. No.

"Q. Was he present on this occasion on January 27, 1955, as far as you know?

"A. No."

and the testimony as given in her deposition as follows:

"Q. Did you see anyone else from the time that you fell until you went back in your office?

"A. No.

"Q. Other than the matron?

"A. I did not see anyone."

It is appellant's contention that since it was established that decedent Story was not present at the time of the accident, knew nothing of it, that, if alive at the time of trial, he could give no testimony in refutation of appellant's version of how the accident occurred. Therefore, says appellant, ". . . the reason for closing the mouth of the living party has ceased to exist and when the reason ceases the rule should cease also." But to sustain appellant's argument and reasoning in support thereof we would be required to overrule the holding in Stuart v. Lord, 138 Cal. 672, 676, 677. This was an action to recover for services rendered to a decedent during his lifetime. Testifying as a witness for the administrator of decedent's estate, a Mrs. Baun related a conversation which she had with plaintiff outside the presence of decedent, wherein plaintiff stated to the witness that the former was "receiving . . . the sum of fifteen dollars per month, and the profits for the sale of butter and eggs, which were produced on the ranch" which compensation was considerably lower than the

amount plaintiff claimed per month for the services by her law suit. Plaintiff sought to take the stand and refute by her testimony the making of such a statement. The trial court ruled that she could not do so in face of objection predicated on the statute here in question.

In holding that the trial court did not err in sustaining the objection to this testimony, the Supreme Court stated (pp. 676, 677):

". . . It cannot be said that the testimony here offered would not tend to establish the plaintiffs' claim or demand. An admission of the plaintiff, against her interest, and in contradiction of an important allegation of the complaint upon which issue was joined namely, the value of her services, is clearly evidence tending to defeat a large part of the asserted claim, reducing it in this case from eight hundred and forty dollars to three hundred and sixty dollars. The evidence having been given it appears to be equally clear that the plaintiff's testimony to the effect that she did not make the admissions, would tend directly to establish so much of her claim as the other testimony tends to defeat. Such testimony cannot be said to arise incidentally, any more than any other evidence directly upon the issues. It certainly comes within the very terms of the statutory provision. Neither can it be said that the spirit or object of the statute justified a departure from its letter. It is true that it may be a hardship upon the plaintiff to be prevented by the law from contradicting the testimony of third persons as to admissions *not made in the presence of the deceased*, but, on the other hand, it can be said with equal force, that it is a hardship on the estate that the deceased is prevented by death from denying any admissions against his interest which witnesses for the

plaintiff may testify were made by him in his lifetime. The manifest object and purpose of the statute is to put them on an equal footing in respect to such evidence. And, besides, *there is nothing in the statute to indicate that its effect was intended to be limited to things which occurred in the presence of the deceased.* The language is: 'Any matter or fact occurring before the death of the deceased,' and *this applies as well to things occurring without his presence as to those in which he may have participated.* . . ." (Emphasis added.)

Manifestly, in the case now engaging our attention appellant sought to testify to matters of fact which occurred before the death of decedent Story and this is what the statute forbids, and it is applicable as well, as stated in Stuart v. Lord, *supra*, p. 677, ". . . to things occurring without his (decedent's) presence as to those in which he may have participated." (See also Yonchina v. Estate of Turner, 154 Cal. App. 2d 134, 136, 137.)

While it is true as urged by appellant that if she ". . . had called Mr. Story on a deposition before he died, and had asked him if he was present on the eighth floor of his building on January 27, 1955, between 12:00 and 1:00 p.m., and he said, 'No,' then under the Sweet case (Sweet v. Markwart, *supra*), plaintiff could testify in person. Because of the technicality of not having gone through this procedure, plaintiff now cannot testify," but this modification in favor of the admissibility of evidence is predicated, as stated in the Sweet case, on the premise, as therein stated, that when, "the decedent has testified in a manner known to the law, and that his testimony is available to his estate, the reason for closing the mouth of the living party has ceased to exist; and when the reason ceases the rule should cease

also." No such situation exists here. While through the years various changes have been made by the legislature in the Probate Code with regard to an action against the executor upon a claim or demand against the estate, it is noteworthy that notwithstanding these changes, no amendment has been made to Section 1880, subdivision 3, and this would strongly indicate that the legislature has not intended to change the expressed meaning of that statute as interpreted by the courts.

The foregoing conclusion at which we have arrived, and since the judgment was in favor of respondent, renders it unnecessary to consider the latter's contention that the court erred in permitting appellant's deposition to be read into evidence over respondent's objection. Suffice it to say that upon the authority of and for the reasons stated in McKee v. Lynch, *supra*, pp. 226, 227 (hearing denied by the Supreme Court), the ruling of the trial court was correct.

We are not in accord with respondent's contention that since appellant's deposition was read into evidence, she cannot be heard to complain of the action of the trial judge in applying the provisions of the Code of Civil Procedure, Section 1880, subdivision 3, because she was not prejudiced, in that, "In her deposition, appellant described fully what occurred, just what she did observe, and what was not observed." As stated by appellant, "The deposition was used as only the next best thing and not as the most desirable evidence"; that she was entitled to "an opportunity elaborate upon, and give in more detail, evidence concerning matters touched upon in her deposition, which was by way of answer to defendant's questions, on Code of Civil Procedure, Section 2055." We have herein set forth in some detail the contents of appel-

lant's deposition, and from a reading thereof, we are satisfied that had the court erred in applying the restrictions of Code of Civil Procedure, Section 1880, subdivision 3, to appellant's testimony, it could not reasonably be urged that the judgment should be affirmed because no prejudice ensued to appellant from such ruling.

Finally, appellant urges that if Code of Civil Procedure, Section 1880, subdivision 3, prohibits her from testifying under the facts of this case, it is unconstitutional as applied thereto, and offends against the Constitution of California, Article I, Section 13, and the due process clause of the United States Constitution as contained in the Fourteenth Amendment thereto. Appellant states that, "No cases have been found either in California, or other jurisdictions, giving specific application of this principle to the same or similar type of case as this." However, appellant argues that these constitutional provisions require a "fair hearing," and that the restriction placed upon appellant's testimony herein denied her equal protection under the law to present "vital evidence" to the jury.

We are satisfied that appellant's claim of unconstitutionality of the statute in question cannot be sustained.

In 11 Cal. Jur. 2d, Const. Law, Section 219, p. 633, it is stated: "Again, the right to testify in the courts of the state is not a privilege or immunity protected by the Fourteenth Amendment, and the state legislature has the power to declare who shall be competent to testify, and to regulate the production of evidence in the state courts." And in 16 C. J. S. Const. Law, Section 128, p. 532, we find the following: "The legislature has the right to control the general competency of witnesses and the subjects of their testimony; but a court cannot be empowered to make a party a competent witness contrary to the general law." In Voinchina v. Estate of

Turner, *supra*, p. 136, the court said that the "statute is supported by sound public policy and was wisely adopted in the interests of justice."

Pertinent to appellant's challenge to the constitutionality of subdivision 3 of Section 1880 of the Code of Civil Procedure, is the language of the court in Fleming v. Superior Court, 196 Cal. 344, 351, "as well might it be contended that section 13 of Article I is violated by section 1881 of the Code of Civil Procedure, which provides that husband and wife may not testify against each other, that an attorney may not testify against his client; that a priest may not as a witness betray the secrets of the confessional, that a physician may not testify against his patient, and that a public officer may not be examined as to communications made to him in official confidence, for a prohibition against all such persons testifying *against* certain parties includes, necessarily, a prohibition against their testifying *in favor* of those opposed to such parties. The same might be said as to other enactments which make various kinds of 'natural' evidence incompetent. Practically all rules of evidence are exclusionary (Jones Ev., sec. 1), and it has never been doubted that the legislature has power to declare certain 'natural' evidence inadmissible, or to declare certain persons incompetent as witnesses, either on grounds of public policy, or for the purpose of conducing to the despatch of business in the courts."

The judgment is affirmed.

WHITE, *P. J.*

We concur:

FOURT, *J.*

LILLIE, *J.*

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APPELLEE'S MOTION TO DISMISS

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 652

GRACE CORSO,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association, as Executor of the Estate of Walter P. Story, also known as W. P. Story, and also known as Walter Perry Story, Deceased,

Appellee.

Appeal From the District Court of Appeal, Second Appellate District, State of California

APPELLEE'S MOTION TO DISMISS.

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IN THE

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GRACE CORSO,

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vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association, as Executor of the Estate of Walter P. Story, also known as W. P. Story, and also known as Walter Perry Story, Deceased,

Appellee.

APPELLEE'S MOTION TO DISMISS.

Pursuant to Rule 16 of the Revised Rules of this Court, appellee (executor) moves to dismiss the appeal on the ground that it does not present a substantial Federal question.

Statement of Case.

Claiming to have fallen January 25, 1955, upon a floor in an office building owned by Mr. Story, the accident not being witnessed by anyone other than plaintiff-appellant, the latter instituted an action based on negligence against Mr. Story to recover damages for personal injuries allegedly so sustained. Appellant's deposition was taken. Thereafter, but prior to trial, Mr. Story died. Solely by reason of the California survival-of-tort statute, the common law doctrine of abatement of such an

action on death of the defendant no longer obtains in California.[1] Appellee bank was appointed executor. Appellant presented her claim against the decedent's estate which claim was rejected by appellee who was substituted as party defendant in the negligence suit in place of decedent.

Trial commenced June 24, 1958, and resulted in verdict and judgment for defendant-appellee. Among other witnesses, plaintiff-appellant called the janitress, Mary Gonzales, as an adverse witness, and called Ann O'Brien (to testify to plaintiff's condition on return to her employer's office after the asserted fall and their walk down the hall about 45 minutes later and her observations then

---

[1]At common law, followed in California until altered by statute, a cause of action for personal injuries abated upon the death of either the person injured or the tort-feasor. (*De La Torre v. Johnsan*, 200 Cal. 754, 254 Pac. 1105; *Munchiando v. Bach*, 203 Cal. 457, 264 Pac. 762.) Although the first alteration in California law occurred by an amendment made in 1931 to California Probate Code, section 574 (*Hunt v. Authier*, 28 Cal. 2d 288, 169 P. 2d 913), it is the enactment by California Stats. 1949, chap. 1380, which here applies. By section 2 thereof, California Civil Code, section 956, was adopted which provided so far as here material, "A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for injury, ..."; by section 5.5 of said 1949 enactment, California Probate Code, section 574, was amended so as to provide at the end thereof, "This section [referring to section 574] shall not apply to an action founded upon a wrong resulting in physical injury or death of any person."; by section 6 of the 1949 enactment, California Probate Code, section 707, was amended so as to provide so far as here material, "All claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses and all claims for damages for physical injuries or death or injury to property or actions provided for in Section 574 of this code, must be filed or presented . . . ." At all times, California Probate Code, section 709, has provided: "If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim with the clerk or present it to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof is made of such filing or presentation."

made), in addition to herself. When plaintiff took the stand, defendant objected, on the basis of California Code of Civil Procedure, section 1880, subdivision 3 (quoted hereafter), to plaintiff testifying in person to any matter or fact occurring before Mr. Story's death. The objection was sustained.[2] On plaintiff's appeal from the judgment, the District Court of Appeal of the State of California, Second Appellate District, Division One, held this ruling to be correct under the statute and that the statute did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. A petition for hearing by the California Supreme Court was denied. Plaintiff filed a notice of appeal to this Court.

The California Statutory Provision.

The California Code of Civil Procedure, section 1880, is a part of the Legislative enactments regarding competency of witnesses and, ever since its amendment by California Code Amendments 1880, chap. 99, sec. 1, page 112, has provided so far as here material:

> "The following persons cannot be witnesses:
>
> "...
>
> "3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

---

[2]Plaintiff's counsel then offered plaintiff's deposition which had been taken prior to Mr. Story's death. Defendant's objection thereto was overruled and the deposition was read to the jury. Plaintiff resumed the stand and testified to matters and facts occurring subsequent to Mr. Story's death.

Appellant's Contentions.

Plaintiff-appellant contends that section 1880, subdivision 3, of the California Code of Civil Procedure, in rendering her incompetent to testify to matters or fact occurring prior to decedent's death in her action against the appellee-executor on her claim against the decedent's estate, is unconstitutional as violative of the Due Process Clause and of the Equal Protection Clause of the United States Constitution. These will be discussed in inverse order.

Lack of a Substantial Federal Question.

1. The California Statute Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff-appellant argues that she has been placed in a "different classification than other plaintiffs in any ordinary case" and that she thereby has been denied equal protection within the meaning of the Fourteenth Amendment. There is no merit in this assertion.

The California Legislature properly and correctly has "classified" *all* actions and proceedings prosecuted against an executor or administrator upon any claim or demand against the estate of a deceased person and has *uniformly* made incompetent as a witness one who appears as plaintiff therein or as plaintiff's assignor or as one in whose behalf the same is prosecuted. Actually, appellant's contention is not that she is being treated any differently than all others who are interested in prosecution of an action or proceeding against an executor or administrator on a claim or demand against decedent's estate. In truth, her complaint is that she, individually, is not being given some different and preferential treatment—by being treated as a competent witness contrary to the uni-

form principle of disqualification of persons, such as she, in such a situation. Her contention, to prevail, would create an unwarranted exception which itself would violate the principles of equality in application of the law.

That good and substantial reasons exist for rendering incompetent as witnesses those who, like plaintiff-appellant, prosecute an action or proceeding against the representative of a deceased person, is clear and is demonstrated by the fact, as conceded by appellant, that "all of the States of the Union, except Louisiana, have a so-called 'Dead Man's Statute,' as Code of Civil Procedure, section 1880 (3), is the statute for California", although the statutes may vary somewhat from state to state. In *Wright v. Wilson* (3rd C. C. A.), 154 F. 2d 616, 170 A. L. R. 1237 (cert. den., *Wright v. Lohr*, 329 U. S. 743, 67 S. Ct. 50, 91 L. Ed. 640), the Court had occasion to discuss the rule which renders the survivor incompetent to testify as a witness. It there was noted in part:

> "At common law both the parties to a suit were incompetent as witnesses on the ground of interest. Greenleaf notes the general rule of the common law with the statement that the rule of the Roman law was the same. An encyclopedia of the same year as the Lewis edition of Greenleaf relates the common law rule specifically to survivors. Chamberlayne some years later sets out the rule and its rationale. More recently Jones in speaking of the same rule adds that it applied both in chancery and at law. And finally Wigmore succinctly emphasizes the fact that a disqualifying interest concept was behind the common law rule of exclusion of parties as witnesses."

The Court then referred to the five different periods in Federal laws and showed that under each a survivor

was not competent as a witness or, by making State principles apply, reached the same result. It was noted

> "The state statutes which changed the common law did so only to a limited extent. While parties were no longer excluded as witnesses, an exception was made with respect to survivor parties. As to them the common law rule still applied. The change was gradual but today pervades almost all the states. Earlier writers speak of the exception as obtaining in 'most states.' A later commentator makes it clear that the exception now is firmly established in all but six of the states.
>
> "The inevitable conclusion is that whatever door one tries it is firmly locked against the admissibility of the proferred testimony in this case. There has never been a Federal rule admitting such evidence because the course of Federal legislation has either been to make only incomplete changes in the original common law or refer the matter to state law by which, as shown, the evidence is inadmissible."

While the Court was not enthusiastic about reaching the result of disqualifying the survivor as the only eye witness in his action for personal injury damage against the decedent's representative, it was observed that it was a situation "where a rule so thoroughly established through many generations of judicial history" should be removed only by general legislation and "not by judicial legislation against a party in a particular case." This Court denied certiorari.

In *State v. La Rocca*, 168 La. 204, 121 So. 744, 748, three defendants were prosecuted jointly under the same bill. While each was allowed to testify for himself, none was allowed to testify for a co-defendant on the basis

of disqualification as a witness. In affirming judgment of conviction, it was held in part:

> "It cannot be seriously contended by defendants that the Fourteenth Amendment as to due process of law has been violated in this case, merely because they were not permitted to have incompetent witnesses testify for them at the trial.
>
> ". . .
>
> "The rule complained of by defendants operates alike and equally as to all principal offenders, actually or constructively present at the commission of a crime. . . .
>
> "The classification, therefore, is not arbitrary or unreasonable. Due process of law and equal protection of the laws are had when the laws affect alike all persons similarly situated: Walston v. Nevin, 128 U. S. 582, 9 S. Ct. 192, 32 L. Ed. 544; Giozza v. Tiernan, 148 U. S. 662, 13 S. Ct. 721, 37 L. Ed. 599; Duncan v. Missouri, 152 U. S. 383, 14 S. Ct. 570, 38 L. Ed. 485."

In *Cady v. State*, 198 Ga. 99, 31 S. E. 2d 38, 46 (cert. den. 323 U. S. 676, 65 S. Ct. 190, 89 L. Ed. 549, the statute provided that neither husband nor wife was competent to testify either for or against the other in any criminal proceeding (with limited exception). It was held, "The constitutionality of this provision of the code was adjudicated in Melton v. State, 180 Ga. 104 (1), 178 S. E. 447, 448, where it was said: 'Under the statute law of this state, a wife is incompetent to testify either for or against her husband on his trial for the offense of murder. The statute embodying this rule is not invalid as being unreasonable or contrary to public policy, or as violating either the due process or equal protection clause of the

State or Federal Constitution.'" In *Melton v. State*, 180 Ga. 104, 178 S. E. 447, 449, it was held:

> ". . . '* * * So far as the federal Constitution is concerned, it "is within the acknowledged power of every Legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government." Fong Yue Ting v. U. S., 149 U. S. 698, 729, 13 S. Ct. 1016, 1028, 37 L. Ed. 905, 918.' . . . He may introduce other witnesses who are not declared to be incompetent by the lawmaking body. The statute of this state which prohibits a wife from testifying for or against her husband, except in certain cases, does not deprive the defendant of his life or liberty without due process, and does not violate the equal protection clause of either the State or the Federal Constitution. The statute affects all married men alike. 'It is only in cases where laws are applied differently to different persons under the same or similar circumstances that equal protection of the law is denied.' Baugh v. City of La Grange, 161 Ga. 80 (2a), 130 S. E. 69."

It is not violative of the Equal Protection Clause of the Fourteenth Amendment for a Legislative enactment to distinguish between gratuitous passengers in vehicles and all other passengers and prescribing different degrees of care owed as to each (*Silver v. Silver*, 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221); nor to prohibit an action for damages for personal injury to be brought by anyone riding in a vehicle and injured through act of the driver where the driver and such person are related within the third degree of consanguinity or affinity (*Harlow v. Ryland*, C. C. A. 8th, 172 F. 2d 784). The matter primarily is one for the Legislature and the Court will not interfere,

even though it disagree with the necessity therefore, unless it clearly and without doubt appears that there is no reasonable basis for the classification made. In *Williamson v. Lee Optical of Okla.*, 348 U. S. 483, 489, 75 S. Ct. 461, 99 L. Ed. 563, the statute subjected opticians to its regulatory provisions but exempted all sellers of ready-to-wear glasses. In upholding this "discrimination" as against the claim that it violated the Equal Protection Clause, it was held:

> "' . . . The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. (Citation.) Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. (Citation.) The legislature may select one phase of one field and apply a remedy there, neglecting the others. (Citation.) The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. . . ."

The California Legislature has wisely and upon grounds of public policy determined that the common law disqualification or incompetency of a party to testify as a witness in an action or proceeding has cause to remain where the action or proceeding is against the executor or administrator upon a claim or demand against the estate of the deceased person. There is no merit in plaintiff's assertion that she, as party plaintiff in such an action or proceeding, is being denied equal protection of the law. The statute applies equally to all plaintiffs (and as-

signors of plaintiffs and persons in whose behalf the action or proceeding is prosecuted) in proceedings against an executor or administrator upon a claim or demand against the estate of a deceased person. The disqualification or competency of a witness to testify concerning a claim or demand against a decedent's estate, in which claim or demand the witness is interested, is within the province of the Legislature to determine. The statute applies equally to all and there is no deprivation of equal protection of the law.

2. The California Statute Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Much of that which has been said or which has been quoted from the authorities in Point 1 equally applies to appellant's position that the California statute is violative of the Due Process Clause of the Fourteenth Amendment. This claim also is untenable.

At common law, a tort action to recover damages for personal injuries abated with defendant's death. This likewise long was the rule in California until altered by statute to provide for survival thereof. (See, footnote 1, *supra.*). In the absence of such a statute, the injured person had no right at common law which survived death. Solely on the basis of the statute is any survival granted or had. It is not a right which appellant has or can claim apart from statute.

As part of the 1949 California statute upon which appellant's proceeding necessarily rests for survival, it is required that a claim or demand be presented. The action, under the survival or enabling statute, became and is one by the survivor on a claim or demand against the estate of the decedent. It is solely a statutory right—one granted solely by law. As to any action or proceeding

by a survivor on a claim or demand against the estate of the decedent, the California Legislature has prescribed for the competency or incompetency of witnesses in regard thereto. The statutory survival-of-tort action permits the plaintiff to proceed but requires that the competent witnesses therein shall not include persons interested in procuring recovery, such as the plaintiff or one in whose behalf the action is prosecuted. There is no violation of the Due Process Clause in making a uniformly applicable law prescribing what witnesses shall or shall not be competent to testify in regard to the statutorily created right, without which statute any right of plaintiff would have abated on defendant's death.

Beyond this, however, is the fact that the competency or incompetency of witnesses, as uniformly prescribed by law, is generally determinable by the Legislature. The so-called "Dead Man's" statute, rendering incompetent as a witness the survivor, is such a determination—which retains in existence the disqualification which from time immemorial has applied. Any change in this ancient rule should come from the Legislature and not the courts. (*Wright v. Wilson, supra*, 154 F. 2d 616, 170 A. L. R. 1237, cert. den. *Wright v. Lohr*, 329 U. S. 743, 67 S. Ct. 50, 91 L. Ed. 640.)

In her "Statement of Jurisdiction," appellant advances for the first time in this cause the contention that the statute (section 1880, subd. 3, Cal. Code Civ. Proc.) "is in essence and effect a conclusive and irrebutiable presumption that the appellant would testify falsely" etc. The argument then is made that this presumption is arbitrary and operates to deny a fair opportunity to repel it. The basic premise is false. The statute creates no presumption, conclusive or otherwise. It deals exclusively with the competency of witnesses and operates alike as to all persons

in every action or proceeding on a claim or demand against the estate of a decedent. Appellant is not precluded from prosecuting the action but only is precluded from presenting as a witness one whom the Legislature has declared to be incompetent as a witness.

Fong Yue Ting v. United States, 149 U. S. 698, 729-730, 13 S. Ct. 1016, 37 L. Ed. 905, concerned an act of Congress which placed the burden on the Chinese person in deportation proceedings (who had not registered and been given a certificate) to prove "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this Act." In upholding the validity thereof, this Court said that the provision—

> ". . . is within the acknowledged power of every legislature to prescribe the evidence which shall be received and the effect of that evidence, in the courts of its own government. *Ogden v. Saunders*, 25 U.S. 12 Wheat. 213, 262, 349 [6:606, 622, 653]; *Pillow v. Roberts*, 54 U.S. 13 How. 472, 476 [14:228 230]; 125 *Baskets of Champagne v. United States* (*Cliquot's Champagne*), 70 U.S. 3 Wall. 114, 143 [18:116, 120]; *Ex parte Fiske*, 113 U.S. 713, 721 [28:1117]; *Holmes v. Hunt*, 122 Mass. 505, 516-519. The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal . . ."

In 16 C. J. S., Const. Law, section 128, page 532, it is said: "The legislature has the right to control the general competency of witnesses and the subjects of their testimony; but a court cannot be empowered to make a party a competent witness contrary to general law." In

11 California Jurisprudence 2nd, Const. Law, section 219, page 633, it is said: "Again, the right to testify in the courts of the state is not a privilege or immunity protected by the Fourteenth Amendment, and the state legislature has the power to declare who shall be competent to testify, and to regulate the production of evidence in the state courts." In *Redus v. State*, 243 Ala. 320, 9 So. 2d 914 (cert. den. 318 U. S. 774, 63 S. Ct. 771, 87 L. Ed. 1143, rehear. den. 318 U. S. 802, 63 S. Ct. 852, 87 L. Ed. 1166), the prosecution in a criminal case, inquiring as to the competency of jurors, asked each juror whether said juror had any moral or religious scruples against capital punishment and whether said juror believed capital punishment was against the Bible. It was held that this did not deny freedom of worship and did not deny any due process of law under the Federal Constitution. Reference heretofore has been made to *State v. La Rocca*, 168 La. 204, 121 So. 744, 748, and its holding that, "It cannot be seriously contended by defendants that the Fourteenth Amendment as to due process of law has been violated in this case, merely because they were not permitted to have incompetent witnesses testify for them at the trial." Also reference heretofore has been made to *Cady v. State*, 198 Ga. 99, 31 S. E. 2nd 38, 46 (cert. den. 323 U.S. 676, 65 S. Ct. 190, 89 L. Ed. 549), and its holding, in regard to the statute which provided that neither husband nor wife was competent to testify either for or against the other in any criminal proceeding (with limited exception), that, quoting from *Melton v. State*, 180 Ga. 104, 178 S. E. 447, 448, " 'Under the statute laws of this state, a wife is incompetent to testify either for or against her husband on his trial for the offense of murder. The statute embodying this rule is not invalid . . . as violating either the due process or equal protection clause of the State or Federal Constitutions.' "

The purpose of the California Statute is not only to place the plaintiff on "equal footing," because death has silenced the lips of the decedent, as stated in *Stuart v. Lord*, 196 Cal. 344, 238 Pac. 88, but also "is to protect the estate from the possibility of fraud, perjury, and injustice" (*In re Kitchen*, 192 Cal. 384, 391, 220 Pac. 301, 30 A. L. R. 1008) or, as expressed in *Warren v. Nair*, 102 Cal. App. 2d 298, 300, 227 P. 2d 515, "It was for the purpose of preventing frauds upon the heirs of a decedent that the 'dead man's statute' was enacted. (*Knight v. Russ*, 77 Cal. 410, 413 [19 P. 698].)" And the Legislature further has determined that the policy of the state shall permit survival of a tort action, following death of the defendant, to be had (contrary to the common law and to the state law in the absence of such survival statute) with the restriction that the plaintiff, prosecuting such action, is not competent to appear as a witness in this newly granted right. The Legislature has the right to determine the matter of competency, particularly where, as here, a rational basis exists therefor. There is no merit in plaintiff's claim that the California statute (and all state statutes), known as the "Dead Man's Statute," is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution.

No substantial Federal Question thus appears presented herein. It therefore respectfully is submitted that the appeal should be dismissed pursuant to Rule 16(b) of the Revised Rules of this Court.

Dated: February 3, 1960.

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